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No. 84-1432

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

WILLIAM J. MARTIN,
Petitioner,

v.

DIGHT W. CRAIN, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

MOTION TO INTERVENE AND RESPONDENT-INTERVENOR'S BRIEF IN OPPOSITION

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MOTION TO INTERVENE

Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts, moves, pursuant to 28 U.S.C. § 2403(b) and Rule 28.4(c) of the Rules of this Court,[1/] to intervene in the

1/ The petitioner served the petition on the Attorney General, as required by Rule 28.4(c), but failed to recite in the petition that 28 U.S.C. § 2403(b) may be applicable, as further required by that rule.

above-captioned case, in which a petition for a writ of certiorari is presently pending before this Court. As grounds for this motion, the Attorney General states that the petition for certiorari calls into question the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D, a state statute affecting the public interest.

The Attorney General did not intervene in the state trial court because the question of the constitutionality of the statute was not raised by the parties, and the Attorney General therefore was not notified of the pendency of the case. See Mass. Gen. Laws Ann. c. 231A, § 8; Mass. R. Civ. P. 24(d). After the trial court, sua sponte, held unconstitutional a portion of Mass. Gen. Laws Ann. c. 71, § 42D, the Attorney General participated as amicus curiae in the Supreme

Judicial Court of the Commonwealth in support of the constitutionality of the statute.

As chief law officer of the Commonwealth, the Attorney General's interest in this case is to uphold the facial constitutionality of chapter 71, section 42D, of the General Laws of the Commonwealth. That interest is not adequately represented by the respondents, who are primarily interested in defending the constitutionality of the statute as applied in this case.

Respectfully submitted,

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Date: March 12, 1985

QUESTION PRESENTED

Whether a state statute that authorizes a school administrator to suspend a teacher for five days or less for any reason that the administrator deems adequate creates a constitutionally protected property interest in avoiding such suspensions.

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RESPONDENT-INTERVENOR'S BRIEF IN OPPOSITION

Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts, the respondent-intervenor,[1/] re-

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1/ The Attorney General has moved to intervene in this case pursuant to 28 U.S.C. § 2403(b) and Rule 28.4(c) of the Rules of this Court on the ground that the petition for a writ of certiorari

(footnote continued)

spectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in this case.

STATEMENT OF THE CASE

The respondent-intervenor adopts the statement of the case contained in the respondents' brief in opposition to the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

As provided in Rule 17 of the Rules of this Court, "review on writ of certiorari is not a matter of right, but of

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(footnote continued)

calls into question the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D, a state statute affecting the public interest.

judicial discretion, and will be granted only when there are special and important reasons therefor."[2/] No such "special and important reasons" warrant the granting of that extraordinary writ in this case. Furthermore, there are several reasons why granting the writ in this case would be particularly inappropriate.

2/ See also Ross v. Moffitt, 417 U.S. 600, 617 (1974); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Wade v. Mayo, 334 U.S. 672 (1948).

I. THE DECISION OF THE SUPREME JUDICIAL COURT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THOSE OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS.

A. A Massachusetts Teacher Has No Constitutionally Cognizable Property Interest In Avoiding A Suspension Of Five Days Or Less.

As stated by this Court in Board of Regents v. Roth, 408 U.S. 564, 569 (1972), "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." "While no State may 'deprive any person of life, liberty, or property, without due process of law,' it is well settled that only a limited range of interests fall within this provision." Hewitt v. Helms, 459 U.S. 460,

466 (1983). Therefore, the threshold determination that must be made in this or any other procedural due process case is whether the interest in question constitutes a constitutionally protected liberty or property interest.[3/] Only if it is determined that such an interest exists, does the question arise of what process is constitutionally due.

In this case, the Supreme Judicial Court correctly determined that Martin had no legitimate claim of entitlement to avoiding his five-day suspension.[4/]

3/ The recently decided case of Cleveland Bd. of Educ. v. Loudermill, 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985), has no direct bearing on this question, since in that discharge case, unlike the present matter relating to a brief suspension, it was undisputed that the employee possessed a property interest. Id. at 4307.

4/ Martin apparently no longer claims to have been deprived of a liberty interest. Pet. 6-11.

Pet. 6a-7a.[5/] In making that determination, the Supreme Judicial Court correctly looked to state law. Pet. 6a. As held by this Court, property interests "are created and their dimensions are defined by . . . state law." Board of Regents v. Roth, 408 U.S. at 577. "To have a property interest in a benefit,

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5/ The Supreme Judicial Court's construction of this state statute as creating "no statutory right or legitimate claim of entitlement to continued employment which made [Martin] immune from the type of short suspension described in § 42D," Pet. 7a, is binding on this Court. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9-11 (1978) (Court looks to state decisional law for definition of interest in question); cf. Mills v. Rogers, 457 U.S. 291, 306 (1982) (remanding for possible certification to state court of question whether a state-created liberty interest exists); Bishop v. Wood, 426 U.S. 341, 345-46 (1976) (in the absence of an authoritative interpretation of state law by a state court, Supreme Court defers to construction of local federal court, "even if an examination of the state-law issue without such guidance might have justified a different conclusion").

a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. See also Cleveland Board of Education v. Loudermill, 53 U.S.L.W. at 4307. Whether a person has a legitimate claim of entitlement, or merely a unilateral expectancy, depends upon how state law defines the substantive interest in question. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981).

An examination of the state statute governing suspensions of five days or less, Mass. Gen. Laws Ann. c. 71, § 42D, Pet. 31a-32a, reveals that, as authoritatively construed by the highest court of the state, that statute creates no legitimate claim of entitlement to avoiding such brief suspensions. Two aspects of

this statute make it unreasonable for a teacher to rely on it as creating such an entitlement: the absence of specific, objective standards for imposing such suspensions and, conversely, the presence of unfettered discretion on the part of school administrators to impose such suspensions "for any . . . cause which such . . . official deems adequate." Mass. Gen. Laws Ann. c. 71, § 42D.

With respect to the absence of standards in the statute, this Court has repeatedly held that a benefit does not rise to the level of a constitutionally cognizable property interest unless it is "defeasible only upon proof of specific acts of misconduct." Meachum v. Fano, 427 U.S. 215, 226 (1976). See also Vitek v. Jones, 445 U.S. 480, 490-91 (1980); Hewitt v. Helms, 459 U.S. at 472;

Barry v. Barchi, 443 U.S. 55, 64 n. 11 (1979). For example, in Goss v. Lopez, 419 U.S. 565 (1975), the Court found that a student had a property interest in avoiding a 10-day suspension from school because, under state law, such suspensions could be imposed only on specified grounds. Id. at 573-74. On the other hand, "[i]f the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can [act] for any constitutionally permissible reason . . .,'" no legitimate claim of entitlement exists. Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (quoting Dumschat, 452 U.S. at 467 (Brennan, J., concurring)).

This general principle has been applied in cases involving public employment. For example, in Fredericks v.

Vartanian, 694 F.2d 891, 892 (1st Cir. 1982), the court held that no property interest in state employment exists in the absence of a state law provision guaranteeing "'that a particular employment relationship will continue unless certain defined events occur.'" Thus, where a state statute specifies that an employee may be removed or suspended only for "good cause" or "sufficient cause" or specific, objective reasons, then a property interest in continued employment has been found to exist.[6/] However,

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6/ See, e.g., Arnett v. Kennedy, 416 U.S. 134, 181 (1974) (White, J., concurring in part and dissenting in part) ("such cause as will promote the efficiency of the service"); Perry v. Sindermann, 408 U.S. 593, 602 (1972) ("sufficient cause"); Loudermill, 53 U.S.L.W. at 4307 (state statute specifying permissible causes for dismissal creates a

(footnote continued)

where, as in this case, suspension is permitted for any subjectively sufficient reason, no legitimate claim for entitlement to uninterrupted employment, and hence no property interest, exists.[7/]

Since the statute in question here not only fails to specify the causes for

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property interest); Best v. Boswell, 696 F.2d 1282, 1289-90 (11th Cir.), cert. denied, 104 S. Ct. 103 (1983) ("improper behavior"). But see Bishop v. Wood, 426 U.S. at 344-45 (statute containing specific grounds for discharge nevertheless construed to permit discharge "at will" of employer and therefore created no property interest).

7/ See, e.g., Board of Regents v. Roth, 408 U.S. at 577-78 (where no provision guaranteed employment "absent 'sufficient cause,'" no legitimate claim of entitlement); Bleeker v. Dukakis, 665 F.2d 401, 403 (1st Cir. 1981) (no property interest where employers could dismiss employee if "in their judgment, he did not perform satisfactorily").

which a teacher may be suspended, but also permits suspension for any cause deemed adequate by the school administrators, it creates no justifiable expectation of avoiding suspension where, in the administrators' subjective view, a suspension is warranted. Therefore, no property interest in avoiding the brief suspensions authorized by Mass. Gen. Laws Ann. c. 71, § 42D, can be held to exist.

A second, intimately related aspect of this statute that forecloses any legitimate claim of entitlement arising from it is its unfettered grant of discretion to school administrators to determine when a suspension is warranted. It is well-settled that discretion negates any claim of entitlement which would mandate the protection of the Due

Process Clause.[8/]

As cogently explained by the Court of Appeals for the First Circuit, a provision which permits an employer to suspend or remove an employee who does not meet the employer's subjective standards of competence does not provide an employee

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8/ See Meachum v. Fano, 427 U.S. at 227-28 (where prison officials have discretion to transfer prisoners, prisoner has no legitimate expectation of remaining at a particular prison); Olim v. Wakinekona, 461 U.S. at 249 (same); Packish v. McMurtrie, 697 F.2d 23, 25 (1st Cir. 1983) (where statutory right to indemnification is discretionary, no property interest in indemnification exists); Loudermill, 53 U.S.L.W. at 4309 n. 8 ("where state conduct is entirely discretionary the Due Process Clause is [not] brought into play"); Bleeker v. Dukakis, 665 F.2d at 403 (wide discretion that employment contract granted to government established lack of property interest in remaining employed).

> with any basis for "rely[ing] reasonably on remaining employed," . . . when faced with an employer wishing to fire him. This lack of any reasonable expectation of continued employment suffices to establish the lack of "property" in the constitutional sense, and hence the lack of a viable due process claim.

Bleeker v. Dukakis, 665 F.2d at 403. "[T]he more circumscribed is the government's discretion . . . to withhold a benefit, the more likely that benefit constitutes 'property,' for the more reasonable is reliance upon its continued availability." Beitzell v. Jeffrey, 643 F.2d 870, 874 (1st Cir. 1981). Conversely, where broad discretion exists to deny or terminate a benefit, "the requisite mutual understanding" to create an entitlement is absent. Leis v. Flynt, 439 U.S. 438, 443 (1979).

In this case, there can be little doubt that the statute in question, by its plain language, vests broad discretion in school administrators by authorizing them to impose suspensions of five days or less "for any . . . cause which [they] deem[] adequate." Mass. Gen. Laws Ann. c. 71, § 42D. Similar language has consistently been construed to grant a degree of discretion sufficient to negate a claim of entitlement. For example, in Bleeker v. Dukakis, 665 F.2d at 403, where an employment contract permitted dismissal of an employee by his employers "if, in their judgment he did not perform satisfactorily," the court held that "[t]his criterion for dismissal is sufficiently broad and subjective to warrant characterizing [plaintiff's] employment contract as one that . . . allowed for

removal 'at will'" and therefore created no property interest in employment.

In sum, the statute at issue here evinces no legislative intent to create a property interest in avoiding suspensions of five days or less. Any interest that Martin may have had in avoiding his five-day suspension was "a mere subjective 'expectancy,'" which is therefore not protected by the Due Process Clause. See Perry v. Sindermann, 408 U.S. at 603.

Moreover, even if some property interest in avoiding a five-day suspension could be identified, it would be so minimal that it would not rise to the level of "property" in the constitutional sense. In Goss v. Lopez, 419 U.S. 565, 576 (1975), this Court noted that where a property deprivation is de minimus, no

account need be taken of the Due Process Clause. In that case, the deprivation in question, a ten-day suspension of a child from school, was found to be more than de minimus because a "total exclusion from the educational process . . . is a serious event in the life of the suspended child." Id. The same cannot be said of a teacher's suspension, which amounts only to a brief interruption of income. Since any deprivation of property incurred by Martin was de minimus at best, no process was due.

This conclusion not only follows inexorably from the above application of traditional due process analysis, but also comports with common sense and sound public policy. A holding to the contrary would involve courts unduly in the discretionary decisions that are the day-to-

day business of school administrators. As held by this Court, a "court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. at 349-50.

B. The Procedures Afforded In This Case Amply Satisfy Constitutional Due Process Requirements.

Assuming, contrary to the above arguments, that Martin was deprived of a constitutionally cognizable property interest, he would be entitled only to minimal procedural safeguards. As held by this Court, "'due process is flexible and

calls for such procedural protections as the particular situation demands.'" Mathews v. Eldridge, 424 U.S. 319, 334 (1976). A determination of what process is "due" in a particular case "requires analysis of the governmental and private interests that are affected." Id. See also Loudermill, 53 U.S.L.W. at 4307-08.

In this case, the private interests involved are minimal. The suspension at issue was only five days long.[9/] As held in Mathews v. Eldridge, "'the possible length of wrongful deprivation of . . . benefits is an important factor in assessing the impact of official action on the private interests.'" Id. at 341. See also Mackey v. Montrym, 443 U.S. 1,

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9/ Compare Best v. Boswell, 696 F.2d at 1290 (two-week suspension under statute permitting summary suspensions of up to 30 days).

12 (1979). Furthermore, a brief and "temporary interruption of income . . . [is] considerably less severe than . . . termination of welfare benefits . . . in the face of 'brutal need,'" Arnett v. Kennedy, 416 U.S. at 168; total exclusion of a child from school, Goss v. Lopez, 419 U.S. at 576; "cessation of essential services" such as water or heat, Memphis Light, Gas & Water Division v. Craft, 436 U.S. at 20; or termination of employment. Loudermill, 53 U.S.L.W. at 4306.

On the other hand, the government's interests in imposing brief suspensions where they are deemed to be warranted are substantial. As recognized by this Court,

> the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the

> Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.

Arnett v. Kennedy, 416 U.S. at 168. See also Connick v. Myers, 461 U.S. 138, 147 (1983).

Since the substantial governmental interests at stake here far outweigh the minimal private interests involved, only rudimentary procedural safeguards would be called for if a deprivation of liberty or property had occurred. Cf. Loudermill, 53 U.S.L.W. at 4308-09 (finding that government's interests in summarily terminating employee were outweighed by employee's interest in avoiding deprivation of the means of livelihood, which

the Court characterized as a severe deprivation).[10/] Since, as recognized by the Supreme Judicial Court, Martin was afforded ample due process protection here, Pet. 8a, no constitutional violation occurred.

In sum, the Supreme Judicial Court correctly upheld the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D. Not only is that holding consistent with prior decisions of this Court and the federal courts of appeals, as discussed above, but it is also consistent with the holdings of other state courts upholding the constitutionality of similar

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10/ The question of whether Martin was afforded sufficient procedural protection prior to his subsequent discharge is not presented here. His discharge, first as part of a reduction in force and then for cause, is the subject of two later cases which are still pending in the state courts.

statutes.[11/] Accordingly, granting of the extraordinary writ of certiorari is not warranted in this case under Rule 17(b) or (c).

II. THE IMPORTANT QUESTION OF FEDERAL LAW POSED BY THE PETITIONER NEED NOT BE REACHED IN THIS CASE.

The broad question of whether a statute permitting the suspension of a teacher for five days or less without any notice or hearing is facially unconstitutional, Pet., Questions Presented, No. I, need not be reached in this case. As recognized by the Supreme Judicial Court, this case can be resolved on nar-

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11/ See, e.g., Wilson v. Minneapolis, 283 Minn. 348, 168 N.W.2d 19, 23 (1969); Yantsin v. Aberdeen, 54 Wash. 2d 787, 345 P.2d 178 (1959); Umholtz v. Tulsa, 565 P.2d 15 (Okla. 1977); People v. Ruddell, 1 Ill. App. 3d 662, 274 N.E.2d 835 (1971).

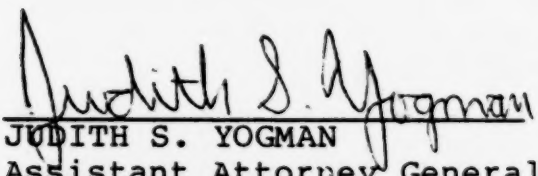
rower grounds, since Martin was given a hearing immediately following his five-day suspension and was also given notice of the reasons for his suspension. Pet. 6a. Accordingly, as stated by the Supreme Judicial Court, the broader constitutional questions posed by Martin "must await another day." Pet. 6a. For this reason, as well, granting of this petition is unwarranted under Rule 17(c).

CONCLUSION

For the above reasons, this Court should deny the petition for a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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